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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BARTOLO MENDEZ, Defendant and Appellant.	E063403 (Super.Ct.No. RIC1404704) OPINION

APPEAL from the Superior Court of Riverside County. Becky L. Dugan, Judge. Affirmed.

Law Offices of Robert D. Salisbury and Robert Salisbury for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, defendant Bartolo Mendez was convicted of lewd acts on a child. In this proceeding, he seeks a certificate of rehabilitation. Under the statutory scheme as it stood

before April 2014 — and as it has stood since January 2015 — a person convicted of a lewd act on a child is not eligible for a certificate of rehabilitation. Between April 2014 and January 2015, however, as a result of a decision of one of our sister courts, it was at least arguable that a person convicted of a lewd act on a child had to be deemed eligible for a certificate of rehabilitation, as a matter of equal protection. Defendant filed his petition during this window period. The trial court, however, did not rule on it until after the window period had closed, and at that point it ruled that defendant was not eligible.

Defendant appeals. He contends that the trial court improperly applied the post-January 2015 law to him retroactively. We disagree. We will hold that the January 2015 statutory amendment that brought the law back to where it stood before April 2014 was merely a clarification, not a true change. Accordingly, the trial court properly applied it to defendant.

I

PROCEDURAL BACKGROUND

In August 1997, defendant was convicted on one count of a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)) and one count of a lewd act on a child aged 14 or 15 (Pen. Code, § 288, subd. (c)). He was placed on probation, on terms including serving six months in jail. He alleges that he successfully completed his probation.

In May 2014, defendant filed a petition for a certificate of rehabilitation. At a hearing in March 2015, the trial court denied the petition on the ground that a person convicted under Penal Code section 288 is statutorily ineligible for a certificate of rehabilitation.

II

THE TRIAL COURT PROPERLY APPLIED

ASSEMBLY BILL 1438 TO DEFENDANT

"With certain exceptions . . . , the certificate of rehabilitation procedure is available to convicted felons who have successfully completed their sentences, and who have undergone an additional and sustained 'period of rehabilitation' in California. [Citations.] During the period of rehabilitation, the person must display good moral character, and must behave in an honest, industrious, and law-abiding manner. [Citations.]" (*People v. Ansell* (2001) 25 Cal.4th 868, 875.)

Under Penal Code former section 4852.01 et seq., as it stood since at least 1998, a certificate of rehabilitation was not available to "*persons serving a mandatory life parole*, persons committed under death sentences, persons convicted of a violation of subdivision (c) of Section 286, *Section 288*, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289 . . . ." (Pen. Code, former § 4852.01, subd. (d), Stats. 1997, ch. 61, § 2, p. 407, italics added.)

In addition, under Penal Code section former 3000.1, as it stood since at least 2013, "any inmate sentenced to a life term under . . . Sections 269 *and* 288.7" was required to serve a mandatory life parole. (Pen. Code, former § 3000.1, subd. (a)(2), Stats. 2012, ch. 43, § 37, p. 2004, italics added.)

This brings us to the case of *People v. Tirey*.[1]

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[1] The full citation is *People v. Tirey* (Nov. 15, 2013) G048369, rehearing granted December 11, 2013, opinion on rehearing *People v. Tirey* (April 25, 2014)

[footnote continued on next page]

In November 2013, *People v. Tirey* (Nov. 15, 2013) G048369 (*Tirey I*) was filed. It held that Penal Code section 4852.01 violated equal protection because it prohibited a person convicted of a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)) from obtaining a certificate of rehabilitation, while allowing a person convicted of the much more serious crime of sexual intercourse, sodomy, oral copulation, or sexual penetration with a child 10 or younger (Pen. Code, § 288.7) to do so. (*Tirey I*, *supra*, G048369.)

The court granted a petition for rehearing, however, and in April 2014, it filed *People v. Tirey* (April 25, 2014) G048369 (*Tirey II*). A majority of two justices still concluded that Penal Code section 4852.01 violated equal protection. (*Tirey II*, *supra*, G048369.) However, this time, a dissenting justice concluded that there was no equal protection violation because the statutory scheme — when correctly construed — did *not* allow a person convicted under Penal Code section 288.7 to obtain a certificate of rehabilitation. (*Tirey II*, *supra*, G048369 [dis. opn. of Thompson, J.].)

The dissenting justice noted that, under Penal Code section 4852.01, a certificate of rehabilitation was not available to a person serving mandatory life parole. (*Tirey II*, *supra*, G048369 [dis. opn. of Thompson, J.].) He also noted that, under Penal Code

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G048369, review granted August 20, 2014, S219050, remanded for reconsideration May 20, 2015, opinion on remand *People v. Tirey* (2015) 242 Cal.App.4th 1255. We will discuss each of these procedural events below, so we do not clutter up the text with them here.

"[U]npublished opinions may be cited if they are not 'relied on.' [Citation.]" (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2.) We cite and discuss the two depublished opinions in *Tirey* as necessary factual background for the published opinion in *Tirey* as well as for the events in this case; we do not rely on them as authority.

section 3000.1, a person sentenced to life under Penal Code "[s]ections 269 and 288.7" was subject to mandatory life parole. (*Tirey II*, *supra*, G048369 [dis. opn. of Thompson, J.].) In his view, "the use of the word 'and' in the phrase 'Sections 269 and 288.7' . . . is a drafting error, which must be disregarded, and treated as a comma or an 'or,' in order to harmonize the various parts and effectuate the purposes of the statute, and to avoid absurd results." (*Ibid.*) Thus, "persons convicted of violating either [Penal Code] section 269 or [Penal Code] section 288.7 alone are subject to mandatory life parole . . . ." (*Ibid.*)

The majority disagreed. It explained: "The statute is clear and unambiguous as written. Had the Legislature intended the interpretation put forward by the [dissent], it could have simply (1) used the word 'or' in place of the word 'and,' or (2) used a sequential comma after the reference to section 269, which would have been consistent with the structure of the subdivision. It did neither, however." (*Tirey II*, *supra*, G048369.)

As mentioned, it was in May 2014 — presumably in reliance on *Tirey II* — that defendant here filed his petition for a certificate of rehabilitation.

In August 2014, the Legislature enacted Assembly Bill 1438 (A.B. 1438). A.B. 1438 made two statutory changes that are particularly relevant here. First, it amended Penal Code section 4852.01 so as to specify that persons convicted of a violation of Penal Code section 288.7 are not eligible for a certificate of rehabilitation. (Pen. Code, former § 4852.01, subd. (d), Stats. 2014, ch. 280, § 3, p. 2569; see now Pen. Code, § 4852.01, subd. (c).) Second, it amended Penal Code section 3000.1, subdivision (a)(2) so as to change "Section 269 *and* 288.7" to "Section 269 *or* 288.7." (Pen. Code,

§ 3000.1, subd. (a)(2), Stats. 2014, ch. 280, § 2, p. 2569, italics added.) A.B. 1438 became effective on January 1, 2015.

Meanwhile, also in August 2014, the Supreme Court granted review in *Tirey II*. In May 2015, it remanded *Tirey* with directions for reconsideration.

In November 2015, the *Tirey* court issued its opinion on remand. (*People v. Tirey* (2015) 242 Cal.App.4th 1255 (*Tirey III*).) It held that, in light of A.B. 1438, there was no equal protection violation, and therefore the defendant was statutorily ineligible for a certificate of rehabilitation. (*Tirey III*, at p. 1262.) It further held that it could properly apply A.B. 1438 in the case before it, even though A.B. 1438 had been enacted while the case was on appeal. (*Tirey III*, at pp. 1258-1259.)

It reasoned that A.B. 1438 did not change the law but rather clarified it: "[It is] the general rule that statutes, including those clarifying existing law, do not operate retrospectively. [Citation.] That rule, however, is subject to an exception, 'when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: "'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute . . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act — a formal change — rebutting the presumption of substantial change.' [Citation.]" [Citation.]' [Citation.]" (*Tirey III , supra*, 242 Cal.App.4th at pp. 1260-1261.) "The legislative history of

Assembly Bill No. 1438 reflects clearly that the Legislature viewed the statutory changes effected by that legislation as clarifications necessary in response to *Tirey I*. [Citation.]" (*Id.* at pp. 1261-1262.)

We agree with *Tirey III*. Of course, if the statutory scheme as it stood before A.B. 1438 were unambiguous, or if the dissent in *Tirey II* were completely unreasonable, things would be different; in that event, we would conclude that A.B. 1438 changed the law, rather than clarifying it. But that is not the case. In fact, when we construe the pre-2014 law in the first instance, we come independently to the same conclusion as the dissent in *Tirey II* — the word "and" in Penal Code former 3000.1, subdivision (a)(2) is clearly a scrivener's error, and the statutes as a whole must be construed as making persons convicted under Penal Code section 288.7, as well as persons convicted under Penal Code section 288, ineligible for a certificate of rehabilitation. Thus, in our view, A.B. 1438 did not actually change the law in any way.

In sum, then, we conclude that A.B. 1438 applies to defendant, that its application to defendant is not impermissibly retroactive, and that in light of A.B. 1438, defendant is not eligible for a certificate of rehabilitation.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.